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MAY 13 1964
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IN THE

Supreme Court of the United States

October Term, 1963

No. 997

MARY GREEN and EDWIN GREEN, JR., as Administrator of the Estate of EDWIN GREEN, Deceased,

Petitioners,

—v.—

THE AMERICAN TOBACCO COMPANY,

Respondent.

BRIEF IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: May 13, 1964

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Petitioners in this Cross Petition were the plaintiffs below* and are the respondents to a petition by this respondent (No. 961), defendant below,* for a writ of certiorari to review the same judgment of the United States Court of Appeals for the Fifth Circuit, which is the subject of the Cross Petition. For the reasons hereinafter set forth, defendant submits that the Cross Petition presents no independent question warranting review by this Court, and that the only reasons for the exercise of this Court's jurisdiction are those set forth in the Petition in No. 961.

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* Petitioners in No. 997 will accordingly be hereinafter referred to as "plaintiffs" and respondent as "defendant."

Citation to Opinions Below

The opinions below are printed in the Appendices of the Cross Petition and are reported as cited therein (Cr. Pet., pp. 1-2).*

Reasons for Denying the Cross Petition

1. *Plaintiffs Have Not Established Defendant's Liability*

Plaintiffs acknowledge this to be an action for "breach of implied warranty" and that that is the sole theory of defendant's alleged "liability" to plaintiffs (Cr. Pet., p. 5)—obviously an issue still to be resolved by a jury in this case because the former jury's general verdicts for defendant have been vacated (Cr. Pet. App. D, p. 52).

Despite that acknowledgment, and its logical consequence, plaintiffs repeat as a basis for review by this Court the selfsame argument rejected below, namely, that from their view of the Florida law the jury had already decided the liability issue in plaintiffs' favor when it answered the first three of the four interrogatories which accompanied its general verdicts in favor of defendant (Cr. Pet., pp. 7, 13). In so contending, plaintiffs not only disregard the limited nature of those factual matters; they completely overlook their own statement of their implied warranty claim. And their conception of Florida warranty law is belied by the very advisory opinion they say the court below did not follow (*infra*, pp. 6-7).

Plaintiffs' implied warranty claim in their amended complaint (R. 4-5) shows that this case cannot be reduced to the three factual matters plaintiffs urge as a finding

* References to the Cross Petition and Appendices are denoted by "Cr. Pet." and "Cr. Pet. App. ——".

of liability (Cr. Pet., pp. 5, 7, 12-13). Their claim alleged in substance that defendant, "possessed of superior knowledge concerning the nature and the manufacture of Lucky Strike cigarettes", thereby "impliedly warranted [they] were fit and safe for human consumption"; that plaintiffs' decedent, Edwin Green, "had no knowledge of or ordinary means to determine" their fitness and "relied" on the warranty in smoking them; that the cigarettes contained "numerous substances which were harmful to the human body" when "used for the purpose and in the manner intended"; that as a result of the foregoing, Green either contracted lung cancer or a pre-existing dormant cancer was activated, which caused his death (R. 4-5).

The four interrogatories plaintiffs refer to (Cr. Pet., p. 5) manifestly did not embrace all the elements of plaintiffs' implied warranty claim. And as both the District Court and the Court of Appeals emphasized (R. 1124; Cr. Pet. App., p. 58), those interrogatories were not intended to cover each and every issue of fact the first jury—or any jury—had to pass upon to resolve the ultimate issue of defendant's liability upon the theory of breach of implied warranty.

Nor is it fair to imply that the District Court's failure to accept and apply the Florida law of warranty was responsible for the fourth interrogatory, thereby assuring a general verdict for defendant on the sole basis of the knowledge issue (Cr. Pet., pp. 6, 7, 8). The fourth interrogatory was responsive to the element of defendant's knowledge pleaded by plaintiffs as part of their warranty claim (R. 4) and the subject of proof by them at trial. Indeed, the knowledge element was one they told the jury it had to decide (R. 35-6).*

* In opening to the jury, plaintiffs' counsel told them (R. 35-6): "We have also separately charged that they have impliedly warranted that they are fit and safe for human consumption

Moreover, it is impossible to say what the jury's general verdict would have been had the fourth interrogatory been omitted.* Certainly plaintiffs would be in no better position if only interrogatories 1, 2 and 3 had been submitted and answered and the same general verdicts for defendant returned. In such case, plaintiffs would not have been entitled to a partial judgment on the issue of liability, notwithstanding the general verdicts. Rule 49(b) of the Federal Rules of Civil Procedure, as plaintiffs acknowledge (Cr. Pet., p. 7, fn. 2), provides in effect that the general verdict may be disregarded only when the answers are consistent with each other, but one or more is inconsistent with the general verdict.

That rule could not avail plaintiffs on the basis of the answers to interrogatories 1, 2 and 3 because it could not be said as a matter of Florida law that such answers are inconsistent with a general verdict for defendant. The reason is plain: the jury's verdict for defendant might well have rested also upon findings that despite any effects of smoking defendant's cigarettes upon Mr. Green, those cigarettes were nonetheless reasonably fit and wholesome for the purpose for which they were sold and that no breach of implied warranty by defendant was the proximate cause of injury to Mr. Green. These were equally essential factual matters involved in plaintiffs' claim which were put to the jury by the trial court's charge and left for decision by general verdict rather than written interrogatory (R. 1115, 1117).

"The issue is whether the manufacturer knew of these harmful substances in the product and either failed to remove it or failed to warn the public, including Edwin Green, of these harmful substances."

* The alternative of an affirmative answer regarding defendant's knowledge need not be considered in view of the Florida Supreme Court's advisory ruling that a manufacturer's or seller's actual knowledge is irrelevant (Cr. Pet., p. 6).

Finally, nothing plaintiffs cite, and nothing we have seen, supports a construction of Rule 49(b) which would authorize any court to ignore any interrogatory after the jury has answered it, then assume that the general verdicts were based on that interrogatory, rather than on different and unrelated questions presented by the charge on warranty, and thereby create an inconsistency between the answers to the remaining interrogatories and the general verdicts.

Plaintiffs betray their awareness of the incomplete factual foundation of their position by their assiduous efforts throughout to exaggerate the import of interrogatory 3 (Cr. Pet., pp. 2, 3, 5, 9, 13, 14).

First, the answer to that interrogatory is not a finding that Green's lung cancer or death was proximately caused by any breach of implied warranty on defendant's part. Under the trial court's charge, the general verdict negates such an interpretation of the jury's answer.

Second, the answer to interrogatory 3 is not even an unequivocal finding that smoking defendant's cigarettes was "the proximate cause" of Green's lung cancer. As the interrogatory plainly leaves open, the jury may well have considered smoking was but "one of the proximate causes" under all the facts and circumstances. Thus the supposed incongruity between "lethal" cigarettes and "reasonable fitness" under Florida law is but the product of plaintiffs' speculation.

Third, there is no dichotomy between "reasonable fitness" as to Green and "as to the public generally" as plaintiffs suppose (Cr. Pet., pp. 3, 7, 8). Unless plaintiffs sustain their burden of proving to a jury's satisfaction that under all the facts and circumstances defendant's cigarettes were not of "ordinary," merchantable quality, i.e., reasonably fit and wholesome for their general purpose and that

such breach was the proximate cause of Green's injury (Cr. Pet. Apps., pp. 43, 45-46), they have not proved a case. Interrogatory 3 does not on its face supply that finding under Florida law or otherwise.

2. *The Supposed Conflict With Florida Law Is Non-existent*

The court below on re-hearing certified but a single question to the Florida Supreme Court, namely, the question of implied warranty law on which it had previously affirmed the judgments for defendant (Cr. Pet. App. 38). That question was addressed to "The fundamental point upon which plaintiffs rely on this appeal," i.e., that the trial court had erred in ruling that a manufacturer's implied warranty "does not cover deleterious substances in its products, the harmful effects of which are unknown to the manufacturer and could not have been known by any developed skill and foresight" (Cr. Pet. App. 5-6).

That is the only question answered by the Florida Supreme Court's advisory opinion (Cr. Pet. App. 43). In light of that court's ruling on the question certified, the Court of Appeals below concluded that the judgments for defendant must be reversed, the jury's verdicts vacated and the case remanded for a new trial because it considered that the error in the trial court's charge complained of by plaintiffs had been confirmed:

> "The court below unquestionably did not depart from the Florida law in so deciding. The 'conflict' plaintiffs see between that decision and the law of Florida (including the Florida Supreme Court's advisory opinion in this case) is entirely of their own creation (Cr. Pet., p. 8 *et seq.*). The supposed conflict springs from the same technique of reading into the advisory opinion more than is there, just as plaintiffs have dealt with the written interrogatories.

Neither the Florida Supreme Court's advisory opinion nor the earlier Florida cases hold that "the ordinary merchantability warranty involved in the instant case" (Cr. Pet. App. 45-6) would be breached as a matter of law by reason of circumstances disclosed in the jury's answers to the written interrogatories. This entire premise of plaintiffs' "conflict" argument is squarely refuted by the Florida Supreme Court itself. As that court said, "the question thus framed does not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of law unmerchantable in Florida under the stated conditions, * * *" (Cr. Pet. App. 43). The court clearly indicated the limited nature of the inquiry before it, i.e., only the so-called knowledge issue, and declined even to state "the scope of warranty implied in the circumstances of this case" or to "comment on the disposition of issues between the court and jury under the law relating to scope and breach of the implied warranty" involved (Cr. Pet. App. 43-4).

The Florida Supreme Court advisory opinion, moreover, confirms the importance under Florida warranty law of the "reasonable fitness" question which the court below ordered retried. Although the Florida Supreme Court declined to define precisely the "scope" of the warranty involved, it nevertheless pointed out "that a product supplied for human consumption shall be reasonably fit and wholesome for that general purpose" (Cr. Pet. App. 44). The terms "merchantability", sometimes used by the court, means the same thing. Thus Justice Drew, who wrote the advisory opinion, defined "the warranty of merchantability, implied by law," to mean that the article sold "was reasonably fit to be used for the purpose for which it was sold." *McBarnette v. Paramount Equipment Corp.*, Fla. 1962, 137 So. 2d 563, 565.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a Writ of Certiorari in No. 997 should be denied.

Respectfully submitted.

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Dated: May 13, 1964

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Opposition to Cross Petition for a Writ of Certiorari was served by mail this 13th day of May, 1964 upon Neal P. Rutledge, 111 N.E. 1st Street, Miami, Florida, and upon Lawrence V. Hastings, 312 Biscayne Building, Miami, Florida, counsel of record for petitioners herein, by depositing the same in a United States mail box at 25 Broadway, New York 4, N. Y., in a wrapper addressed to each of said counsel as aforesaid with sufficient airmail postage prepaid.

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Dated: May 13, 1964